Mohd Azizul bin Abd Wahab v Tan Sri Dato' Seri Abdul Hamid bin Bador (IG) (Pengerusi Lembaga Tatatertib Polis DiRaja Malaysia, Bukit Aman) & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01(A)-21–01 OF 2023
SUPANG LIAN, AZIMAH OMAR AND WONG KIAN KHEONG JJCA
7 APRIL 2025

Police — Disciplinary proceedings — Dismissal — Whether dismissal of investigating officer ('IO') was justified for failing to investigate numerous investigation papers ('IPs') under his care and custody and for failing to hand over IPs and case exhibits in his possession to his superior officer before going on transfer — Whether punishment of dismissal was warranted to deter other IOs from committing similar offences — Whether disciplinary proceedings taken against officer were lawful in all respects

The second respondent('R2') had dismissed the appellant from the police force after finding him guilty on three disciplinary charges under the Public Officers (Conduct and Discipline) Regulations 1993 ('the PO(CD)R'). The charges concerned the appellant's failure, whilst he was investigating officer ('IO') at the Langkawi district police headquarters in Kedah, to investigate numerous criminal investigation papers ('IPs') that were under his care and custody as well as his failure to hand over to his supervising officer all IPs and case exhibits which were in his possession before he went on transfer to the North Klang district police headquarters as IO. The three charges — for insubordination and for acting inefficiently and irresponsibly — not only constituted breaches of several provisions of the PO(CD)R, all punishable under reg 38 thereof, but also breached the Inspector General of Police's Standing Orders ('IGSO'). Via a judicial review application ('JRA'), the appellant sought to quash his dismissal and obtain reinstatement to his previous office without loss of salary, allowances and benefits. The High Court dismissed the JRA, holding, inter alia, that the decision to dismiss the appellant complied with the law. In the instant appeal against the decision, the appellant raised several grounds including that regs 37, 37A, 37B, 37C and 37D of the PO(CD)R discriminated against police officers and were void for contravening art 8(1) of the Federal Constitution ('the FC') as well as for being inconsistent with arts 132 and/or art 135(2) of the FC. The appellant's argument in this regard was that whilst public officers in the 'general public service of the Federation' (see art 132(1)(c) of the FC) and 'joint public services mentioned in art 133 FC' (see art 132(1)(f) of the FC) if found guilty and punished by the Public Services Disciplinary Board ('DB') under the Public Services

Disciplinary Board Regulations 1993 had a right to appeal against the DB's decision to the Public Services Disciplinary Appeal Board ('DAB'), police officers had no such right of appeal to the DAB if they were found guilty and punished by the Disciplinary Authority ('DA') under the PO(CD)R. Apart from this constitutional question, the appellant also contended that the charges against him were defective and that the delay of almost six years and ten months in the taking of disciplinary proceedings against him was a condonation of his misconduct.

Held, dismissing the appeal and affirming the High Court's decision:

(1) Regulations 37, 37A, 37B, 37C and 37D of the PO(CD)R did not discriminate against police officers vis a vis members of the general public service/joint public services and were not void for breaching art 8(1) of the FC or for being inconsistent with arts 132 and 135 of the FC because: (a) all police officers as a class, irrespective of their rank, race, gender and age, were treated equally under the PO(CD)R in the sense that they had no right to appeal to the DAB against any decision of the DA; (b) the provisions of the PO(CD)R in question fulfilled the reasonable classification test based on intelligible differentia; (c) unlike members of the general public service/joint public services, police officers had onerous statutory duties under the Police Act 1967 which required there to be high discipline within the ranks and to justify the denial of a right of appeal if the DA found them guilty of committing a disciplinary offence. This allowed disciplinary proceedings to be concluded expeditiously but did not affect the right to apply for judicial review of the DA's decision; and (d) reg 37(2)(b) of the PO(CD)R expressly conferred a right on a police officer charged with a disciplinary offence punishable with dismissal or reduction in rank to make a written representation to exculpate himself of the charge. Regulation 37(2)(b) was therefore consistent with art 135(2) FC (see paras 45–47).

(2) The charges against the appellant were not defective. They contained all the elements mandatorily required by reg 37(2)(a) of the PO(CD)R. In addition, the appellant had had legal advice concerning the charges and he had also furnished a 52 page representation detailing why he was not culpable (see paras 51–54).

(3) Given the onerous statutory duties that police officers were required to observe, the IGSO and all circulars and guidelines issued for the efficient functioning and discipline of the police force had the force of law (see paras 55–59).

(4) The appellant's contention that the delay in the taking of disciplinary proceedings against him was a condonation of his misconduct by the respondents was an afterthought as this issue was never raised in his representation to the three charges (see para 71).

(5) The High Court had rightly dismissed the JRA application as the second respondent's decision to dismiss the appellant was not illegal, irrational or disproportionate in all the circumstances of the case. The charges against the appellant were serious. Without the IPs, the public prosecutor would not be in a position to decide whether to direct further investigations into a case or institute a charge, direct 'no further action' or discontinue any prosecution that had been made. The prosecution in pending court cases would also have been severely handicapped by the 'missing IPs'. In the circumstances, the appellant's dismissal was fully justified and served to deter other IOs from committing similar offences (see paras 72–76).

[Bahasa Malaysia summary

Responden kedua('R2') telah memecat perayu daripada pasukan polis selepas mendapati dia bersalah atas tiga pertuduhan tatatertib di bawah Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 ('PPA(KT)'). Pertuduhan tersebut berkaitan dengan kegagalan perayu, semasa beliau bertugas sebagai Pegawai Penyiasat (PP) di Ibu Pejabat Polis Daerah Langkawi, Kedah, untuk menjalankan siasatan ke atas sejumlah kertas siasatan jenayah (SJ) yang berada di bawah jagaan dan tanggungjawab beliau, serta kegagalannya untuk menyerahkan kepada pegawai penyelia semua SJ dan barang kes yang berada dalam milikannya sebelum beliau ditukarkan ke Ibu Pejabat Polis Daerah Klang Utara sebagai PP. Ketiga-tiga pertuduhan — iaitu kerana tindakan ingkar perintah serta bertindak secara tidak cekap dan tidak bertanggungjawab — bukan sahaja merupakan pelanggaran terhadap beberapa peruntukan dalam PPA(KT), yang kesemuanya boleh dihukum di bawah peraturan 38 peraturan tersebut, malah turut merupakan pelanggaran terhadap Perintah Tetap Ketua Polis Negara ('PTKPN'). Melalui permohonan semakan kehakiman ('PSK'), perayu memohon untuk pembatalan keputusan pemecatannya serta pelantikan semula ke jawatan asal tanpa kehilangan gaji, elaun dan manfaat-manfaat yang berkaitan. Mahkamah Tinggi menolak JRA, dengan memutuskan, antara lain, bahawa keputusan untuk memecat perayu mematuhi undang-undang. Dalam rayuan semasa terhadap keputusan itu, perayu membangkitkan beberapa alasan termasuk peraturan 37, 37A, 37B, 37C dan 37D PPA(KT) mendiskriminasi pegawai polis dan tidak sah kerana melanggar perkara 8(1) Perlembagaan Persekutuan ('PP') serta tidak selaras dengan perkara 132 dan/atau 132(2) PP. Hujahan pihak perayu dalam hal ini adalah bahawa walaupun pegawai awam dalam 'perkhidmatan awam am Persekutuan' (lihat perkara 132(1)(c) PP) dan 'perkhidmatan awam bersama seperti yang dinyatakan dalam perkara 133 Perlembagaan Persekutuan' (lihat perkara 132(1)(f) PP), jika didapati bersalah dan dikenakan hukuman oleh Lembaga Tatatertib Perkhidmatan Awam ('LTPA') di bawah Peraturan-Peraturan Lembaga Tatatertib Perkhidmatan Awam 1993 mempunyai hak untuk merayu terhadap keputusan LTPA kepada Lembaga Rayuan Tatatertib Perkhidmatan Awam ('LRTPA'), namun pegawai polis tidak mempunyai hak rayuan sedemikian kepada LRTPA sekiranya mereka didapati

bersalah dan dikenakan hukuman oleh Pihak Berkuasa Tatatertib ('DA') di bawah PPA(KT). Selain daripada persoalan perlembagaan ini, perayu juga berhujah bahawa pertuduhan terhadapnya adalah cacat dan kelewatan selama hampir enam tahun dan sepuluh bulan dalam memulakan prosiding tatatertib terhadapnya merupakan suatu bentuk pengampunan terhadap salah lakunya.

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Peraturan 37, 37A, 37B, 37C dan 37D PPA(KT) tidak mendiskriminasi terhadap pegawai-pegawai polis berbanding dengan anggota perkhidmatan awam am/perkhidmatan awam bersama dan tidak terbatal atas alasan melanggar perkara 8(1) PP atau kerana tidak selaras dengan perkara 132 dan 135 PP kerana: (a) semua pegawai polis sebagai satu kelas, tanpa mengira pangkat, bangsa, jantina dan umur mereka, dilayan sama rata di bawah PPA(KT) dalam erti kata bahawa mereka tidak berhak untuk merayu kepada LRTPA terhadap sebarang keputusan DA; (b) peruntukan PPA(KT) yang dipersoalkan telah memenuhi ujian pengelasan yang munasabah berdasarkan perbezaan yang dapat difahami (*intelligible differentia*); (c) tidak seperti anggota perkhidmatan awam am/perkhidmatan awam bersama, pegawai polis mempunyai kewajipan berkanun yang berat di bawah Akta Polis 1967 yang memerlukan tahap disiplin yang tinggi dalam kalangan anggota serta bagi mewajarkan penafian hak untuk merayu sekiranya DA mendapati mereka bersalah melakukan kesalahan tatatertib. Ini membolehkan prosiding tatatertib diselesaikan dengan cepat tanpa menjejaskan hak untuk memohon semakan kehakiman terhadap keputusan DA; dan (d) peraturan 37(2)(b) PPA(KT) secara nyata memberikan hak kepada pegawai polis yang didakwa dengan kesalahan tatatertib yang boleh dihukum dengan pembuang kerja atau penurunan pangkat untuk membuat representasi bertulis untuk mengecualikan dirinya daripada pertuduhan itu. Oleh itu, peraturan 37(2)(b) adalah konsisten dengan perkara 135(2) PP (lihat perenggan 45–47).

(2) Pertuduhan terhadap perayu tidak cacat. Ia mengandungi semua elemen yang diperlukan secara mandatori oleh peraturan 37(2)(a) PPA(KT). Di samping itu, perayu telah mendapat nasihat undang-undang berhubung pertuduhan dan dia juga telah mengemukakan representasi 52 muka surat yang memperincikan mengapa dia tidak bersalah (lihat perenggan 51–54).

(3) Memandangkan kewajipan berkanun yang berat yang perlu dipatuhi oleh pegawai polis, IGSO dan semua pekeliling dan garis panduan yang dikeluarkan untuk fungsi cekap dan disiplin pasukan polis mempunyai kuasa undang-undang (lihat perenggan 55–59).

(4) Pendapat perayu bahawa kelewatan dalam memulakan prosiding

tatatertib terhadapnya adalah satu pengampunan terhadap salah lakunya oleh responden-responden adalah pemikiran semula kerana isu ini tidak pernah dibangkitkan dalam representasinya atas ketiga-tiga pertuduhan (lihat perenggan 71).

(5) Mahkamah Tinggi telah dengan sewajarnya menolak permohonan JRA memandangkan keputusan responden kedua untuk memecat perayu tidak bersifat menyalahi undang-undang, tidak rasional atau tidak seimbang berdasarkan keseluruhan keadaan kes ini. Pertuduhan terhadap perayu adalah serius. Tanpa SJ, pendakwa raya tidak akan berada dalam kedudukan untuk memutuskan sama ada perlu mengarahkan siasatan lanjut ke atas sesuatu kes, memulakan pendakwaan, mengarahkan 'tiada tindakan lanjut' atau menghentikan sebarang pendakwaan yang telah dimulakan. Pendakwaan dalam kes-kes yang sedang berjalan di mahkamah juga akan terjejas teruk akibat 'kehilangan SJ' tersebut. Dalam keadaan sedemikian, pemecatan perayu adalah sepenuhnya wajar dan berfungsi sebagai langkah pencegahan kepada PP lain daripada melakukan kesalahan yang sama (lihat perenggan 72–76).]

Cases referred to

Abdul Ghani bin Ali Ahmad & Ors v PP [2001] 3 MLJ 561, FC (refd)
Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1, FC (refd)
Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener) [2004] 2 MLJ 257, FC (refd)
Datuk Haji Harun bin Haji Idris v PP [1977] 2 MLJ 155, FC (refd)
Ezaky Mulya bin Sapawi v Dato' Sri Nadzri Siron (Pengerusi Lembaga Tatatertib, Kumpulan Sokongan (No 1)) & Ors [2020] MLJU 1920; [2021] 2 AMR 173, HC (refd)
Ezaky Mulya bin Sapawi v Dato' Sri Nadzri Siron Pengerusi Lembaga Tatatertib Kumpulan Sokongan (No 1) Jabatan Pengangkutan Jalan Malaysia & Ors [2022] 5 MLJ 472, CA (refd)
Ketheeswaran a/l Kanagaratnam & Anor v PP [2024] 1 MLJ 851, FC (refd)
Malaysian Bar & Anor v Government of Malaysia [1987] 2 MLJ 165, SC (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
PP v Khong Teng Khen & Anor [1976] 2 MLJ 166, FC (refd)
Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased) [2008] 6 MLJ 1, FC (refd)
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)
Shariffah Masturah bt Mohamad Japara v Pengerusi Lembaga Tatatertib Kumpulan Sokongan (No 1) Jabatan Imigresen Malaysia, Putrajaya & Ors [2020] MLJU 220; [2020] 6 MLRH 35, HC (refd)
Vijayarao a/l Sepermaniam v Suruhanjaya Perkhidmatan Awam Malaysia

A [2018] 12 MLJ 17; [2018] 9 CLJ 141, FC (refd)

Legislation referred to

Evidence Act 1950 ss 103, 114(e), (g)
Federal Constitution arts 4(1), 8(1), 132, 132(1), (1)(c), (1)(d), (1)(f), (2), 133, 135, 135(2), 144(1), (5A), (5B)
Penal Code ss 191, 193
Police Act 1967 ss 3(3), 13, 19, 20(3), 97, Second Schedule
Public Officers (Conduct and Discipline) Regulations 1993 regs 2(1), 3, 4(2)(d), (2)(e), (2)(f), (2)(g), (2)(i), (2)(j), 34, 34(1), 35, 37, 37(2), (2)(a), (2)(b), 37A, 37B, 37C, 37D, 37D(a), (b), Part V
Public Services Disciplinary Board Regulations 1993 regs 2(1), 3(1), 10, 11, 12, 12(1), 14, 15, 17

Appeal from: *Mohd Azizul bin Abd Wahab lwn Tan Sri Dato' Seri Abdul Hamid bin Bador (IG) Pengerusi Lembaga Tatatertib Polis Diraja Malaysia, Bukit Aman dan lain-lain* [2023] MLJU 105 (High Court, Shah Alam)

G Subramaniam Nair (with Nurfatin Amirah bt Mohd Shaari) (Maniam Nair & Co) for the appellant.
Nur Aifaa bt Che Abdullah (with Natrah bt Mazman) (Attorney General's Chambers) for the respondents.

Wong Kian Kheong JCA (delivering judgment of the court):

A. INTRODUCTION

[1] This appeal concerned a judicial review application ('JRA') by a police inspector who had been dismissed from the Police Force pursuant to regs 37 and 37D of the Public Officers (Conduct and Discipline) Regulations 1993 ('the PO(CD)R').

[2] Two novel questions of constitutional law arise in this appeal, namely:

(1) whether regs 37, 37A, 37B, 37C and 37D of the PO(CD)R have contravened art 8(1) of the Federal Constitution ('the FC') and are therefore void pursuant to art 4(1) of the FC because:

(a) unlike police officers, public officers in:

(i) the 'general public service of the Federation' (art 132(1)(c) of the FC); and

(ii) the 'joint public services mentioned' in art 133 of the FC (art 132(1)(f) of the FC),

– if found guilty and punished by the relevant 'Public Services

Disciplinary Board' ('DB') (established under reg 2(1) of the Public Services Disciplinary Board Regulations 1993 ('the PSDBR')), have a right under reg 14 of the PSDBR to appeal against the DB's decisions to the 'Public Services Disciplinary Appeal Board' (DAB) (which is established by reg 12(1) of the PSDBR).

(b) regs 37, 37A, 37B, 37C and 37D of the PO(CD)R discriminate against police officers who have been:

(i) found guilty of disciplinary offences by a 'Disciplinary Authority' ('DA') (defined in reg 3 of the PO(CD)R); and

(ii) punished by the DA ('DA's decisions').

(c) the DA's decisions cannot be appealed by the police officers in question to the DAB.

(2) are regs 37, 37A, 37B, 37C and 37D of the PO(CD)R inconsistent with:

(a) art 132 of the FC; and/or

(b) art 135(2) of the FC,

– and are therefore void to the extent of the above inconsistency according to art 4(1) of the FC?

B. BACKGROUND

[3] We shall refer to parties as they were in the High Court.

[4] On 16 July 2008, the applicant ('applicant') commenced training as a probationary police Inspector.

[5] Upon the completion of the applicant's training, he was posted to be an Investigating Officer ('IO') in Langkawi District Police Headquarters ('IPD Langkawi').

[6] On 1 March 2017, the applicant was transferred from IPD Langkawi to North Klang District Police Headquarters ('IPD Kelang Utara').

[7] The Officer in Charge of Langkawi Police District ('OCPD') sent a letter dated 26 March 2017 to the applicant ('Langkawi's OCPD show cause letter (26 March 2017)'). Langkawi's OCPD show cause letter (26 March 2017) stated as follows, among others:

(1) despite the fact that the applicant had been requested to hand over investigation papers ('IPs') and case exhibits ('exhibits') under his care

and custody (when he was serving as an IO in IPD Langkawi) before his transfer to IPD Kelang Utara, he had failed to do so ('applicant's failure');

(2) the OCPD requested the applicant to show cause in writing regarding the applicant's failure within 14 working days from the date of the applicant's receipt of Langkawi's OCPD show cause letter (26 March 2017); and

(3) if the applicant fails to furnish a written explanation in respect of the applicant's failure within 14 working days from the date of the applicant's receipt of Langkawi's OCPD show cause letter (26 March 2017), disciplinary action against the applicant would be considered.

[8] The applicant did not provide a written explanation to Langkawi's OCPD show cause letter (26 March 2017).

[9] The applicant alleged that when he went to IPD Langkawi in early May 2017, he discovered that he could not find the IPs, exhibits, hand-over register (*daftar serah-menyerah*) and his own personal effects.

[10] On 14 May 2017, the OCPD sent a second letter to the applicant ('Langkawi's OCPD show cause letter (14 May 2017)'). According to Langkawi's OCPD show cause letter (14 May 2017), among others:

(1) the applicant failed to hand over 283 IPs which were in the applicant's custody;

(2) the applicant had not recorded in writing the exhibits which were in the applicant's custody;

(3) the applicant's conduct in reporting for duty in IPD Kelang Utara without handing over the IPs and exhibits, clearly showed the applicant's irresponsible attitude and disobedience to his superior (*sifat TIDAK BERTANGGUNGJAWAB dan TIDAK MENGHORMATl ketua*);

(4) the applicant was requested to:

(a) give a written explanation regarding the applicant's aforesaid failure within seven working days from the date of the applicant's receipt of Langkawi's OCPD show cause letter (14 May 2017); and

(b) hand over all the IPs, record the exhibits and vacate his office in IPD Langkawi before 30 June 2017.

(5) if the applicant fails to do what was required as aforesaid, disciplinary action against the applicant would follow (*kegagalan anda berbuat demikian akan menyebabkan tindakan tatatertib menyusul*).

[11] The applicant did not respond to Langkawi's OCPD show cause letter (14 May 2017). Nor did the applicant do what was required in Langkawi's OCPD show cause letter (14 May 2017). A

[12] In November 2017, ASP Mohd Nizam bin Hassan made a complaint to the Integrity and Standards Compliance Department (*Jabatan Integriti dan Pematuhan Standard*) ('JIPS') of Kedah Contingent Police Headquarters ('IPK') regarding the applicant's failure. B

[13] On 26 March 2017, with regard to the applicant's failure the Langkawi OCPD made a formal complaint to the Head of Criminal Investigation Department, Kedah IPK. C

[14] JIPS conducted an investigation regarding the applicant's failure ('investigation (JIPS)'). D

[15] In the course of the investigation ('JIPS'), two statements were recorded from the applicant on 24 July 2018 and 24 December 2018 ('applicant's two statements (JIPS)'). According to the applicant's two statements (JIPS), among others: E

(1) the applicant had handed 305 IPs to the IP Warden, Corporal Syamsuri bin Aripin (Corporal Syamsuri), before the applicant was transferred to IPD Kelang Utara;

(2) the applicant admitted that he did not prepare a hand-over list of the IPs to Corporal Syamsuri; F

(3) the applicant alleged that his handing over of the 305 IPs to Corporal Syamsuri had been documented by him in his 'despatch book'. The applicant however claimed that he left his despatch book in IPD Langkawi and the despatch book could not be found; and G

(4) the applicant averred that he had registered all exhibits with the exhibit store.

H

[16] The first respondent ('first respondent') was the then Inspector General ('IG') and Chairman of the DA in this case ('the second respondent (second respondent)').

[17] The first respondent sent a letter dated 4 February 2020 to the applicant ('first respondent's letter (4 February 2020)'). According to the first respondent's letter (4 February 2020), among others: I

(1) the first respondent had received a report that the applicant had

committed disciplinary offences which would enable disciplinary action to be taken against the applicant;

(2) acting as the Chairman of the DA, the first respondent had considered all the available information and had decided that there existed a *prima facie* case against the applicant wherein disciplinary proceedings should be taken against the applicant with a view to dismiss him or to reduce his rank (disciplinary action) under reg 37 of the PO(CD)R;

(3) the disciplinary action was based on the following three charges (three charges):

(a) the first charge ('first charge'):

Bahawa anda [applicant] sehagai Pegawai Awam, dalam Pasukan Polis Diraja Malaysia ketika itu bertugas sebagai Pegawai Penyiasat Jenayah, di [IPD Langkawi], Kedah, didapati ingkar perintah kerana gagal membuat edaran pertama 165 kertas siasatan seperti di Lampiran A dalam masa (7) hari dari tarikh repot dibuat kepada Pegawai Penyelia yang mana bertentangan dengan Para 4.1, PTKPN BHG 'D' 150(A) — Pengedaran Kertas-Kertas Siasatan.

Perbuatan ini boleh diertikan sebagai ingkar perintah dan telah melanggar tatakelakuan di bawah Peraturan 4(2)(i) Peraturan-peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 seperti berikut —

4(2) *Seseorang pegawai tidak boleh*

(i) ingkar perintah atau berkelakuan dengan apa-apa cara yang boleh ditafsirkan dengan munasabah sebagai ingkar perintah.

Jika anda didapati bersalah terhadap Pertuduhan Pertama, anda boleh dihukum mengikut Peraturan 38, peraturan yang sama. (Emphasis added.)

(b) the second charge ('second charge'):

Bahawa anda [applicant] sebagai Pegawai Awam, dalam Pasukan Polis Diraja Malaysia ketika itu bertugas sebagai Pegawai Penyiasat Jenayah, di [IPD Langkawi], Kedah, mulai bulan April 2010 hingga bulan Disember 2014 didapati kurang berusaha kerana tidak mengambil apa-apa tindakan dengan sepatutnya ke atas 121 kertas siasatan seperti di Lampiran B yang diedarkan kepada anda oleh Pegawai Penyelia menyebabkan siasatan tergendala dan tiada berkeputusan.

Perbuatan ini boleh diertikan sebagai kurang berusaha dan telah melanggar tatakelakuan di bawah Peraturan 4(2)(e) Peraturan-peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 seperti berikut —

4(2) *Seseorang pegawai tidak boleh*

(e) kurang cekap atau *kurang berusaha*,

Jika anda didapati bersalah terhadap Pertuduhan Kedua, anda boleh

dihukum mengikut Peraturan 38, peraturan yang sama. (Emphasis added.)

(c) the third charge ('third charge'):

Bahawa anda [applicant] sebagai Pegawai Awam, dalam Pasukan Polis Diraja Malaysia ketika itu bertugas sebagai Pegawai Penyiasat Jenayah, di [IPD Langkawi], Kedah, antara 1.3.2017 hingga 24.12.2019 didapati tidak bertanggungjawab kerana gagal menyerahkan 286 kertas siasatan seperti di Lampiran C kepada Pegawai Penyelia sebelum bertukar dan melaporkan diri sebagai Insp. (D7A) Judi/Maksiat/Gangsterism, [IPD Kelang Utara], Selangor.

Perbuatan ini boleh diertikan sebagai tidak bertanggungjawab dan telah melanggar tatakelakuan di bawah Peraturan 4(2)(g) Peraturan-peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 seperti berikut —

4(2) *Seseorang pegawai tidak boleh —*

(g) *Tidak bertanggungjawab.*

Jika anda didapati bersalah terhadap Pertuduhan Ketiga, anda boleh dihukum mengikut Peraturan 38, peraturan yang sama. (Emphasis added.)

(4) the applicant was required to submit a written representation which would contain grounds upon which the applicant would rely to exculpate himself from the three charges within 21 days from the date of the applicant's receipt of the first respondents letter (4 February 2020).

[18] The applicant had acknowledged in writing the receipt of the first respondent's letter (4 February 2020) on 6 February 2020.

[19] On 28 February 2020, the applicant wrote a letter to the first respondent ('applicant's letter (28 February 2020)'), The applicant's letter (28 February 2020) stated as follows, among others:

(1) the applicant applied for an extension of time to answer the three charges; and

(2) the applicant applied for a copy of the following documents:

(a) the statements of the complainant and all witnesses recorded in the course of the investigation (JIPS);

(b) the applicant's two statements (JIPS);

(c) the complaint against the applicant;

(d) with regard to the 165 IPs which were stated in Annexure A to the first charge:

(i) the front page of the 165 IPs;

(ii) all the minutes of the 165 IPs; and

(iii) the IP Register (*Baku Daftar Kertas Siasatan*) regarding the 165 IPs.

(e) IG's 'Standing Orders' (*Perintah-Perintah Tetap*) (IGSO), Bahagian D 150(A);

(f) in respect of the 121 IPs which were stated in Annexure B to the second charge:

(i) the front page of the 121 IPs;

(ii) all the minutes of the 121 IPs; and

(iii) the IP Register regarding the 165 IPs.

(g) with regard to the 286 IPs which were stated in Annexure C to the third charge:

(i) the front page of the 286 IPs;

(ii) all the minutes of the 286 IPs; and

(iii) the IP Register in respect of the 286 IPs.

(h) all the documents which were relevant to the disciplinary action.

[20] The first respondent replied to the applicant's letter (28 February 2020) in a letter dated 19 March 2020 ('first respondent's letter (19 March 2020)'). According to the first respondent's letter (19 March 2020), among others:

(1) the applicant was given the documents applied for in the applicants letter (28 February 2020) ('documents (requested by applicant)'); and

(2) the applicant was given 21 days from the date of his receipt of the documents (requested by applicant) to submit a written representation in reply to the three charges.

[21] On 5 May 2020, the applicant acknowledged in writing the receipt of the documents (requested by applicant).

[22] The applicant sent a letter dated 10 June 2020 to the first respondent ('applicant's letter (10 June 2020)'). In the applicant's letter (10 June 2020), among others:

(1) the applicant applied for a further extension of time to answer the three charges because:

(a) the applicant needed time to:

(i) peruse the numerous documents (requested by applicant) provided to the applicant; and

(ii) discuss with his legal experts (*pakar-pakar perundangan*).

(b) the applicant had to perform his official duties during the Covid-19 pandemic; and

(c) the applicant had to take care of family matters.

(2) the applicant stated that he had a right to defend himself against the three charges pursuant to, among others:

(a) art 135(2) of the FC;

(b) regs 34 and 37 of the PO(CD)R; and

(c) the applicant's right to be heard.

[23] In June 2020, the applicant submitted a written representation in response to the three charges ('applicant's representation'). According to the applicant's representation, among others:

(1) the applicant did not admit the first charge and stated as follows:

(a) the first charge was defective because the first charge did not state the date when the applicant was alleged to have committed the disciplinary offence as stated in the first charge;

(b) the first charge concerned 165 IPs but the statements of four witnesses recorded during the investigation (JIPS) and the applicant's first statement to JIPS ('applicant's first statement (JIPS)') gave different numbers of IPs which were the subject matter of the first charge;

(c) the 165 IPs (which were the subject matter of the first charge) were also part of the 286 IPs which constituted the third charge. Hence, the applicant was unjustly charged twice for the 165 IPs; and

(d) two IPs as alleged in the first charge had been handed over to the IP Warden, Corporal Syamsuri.

(2) the second charge was denied by the applicant. The applicant further stated as follows:

(a) the second charge was defective because according to the IP Register for the year of 2010, 2011, 2012 and 2014, the applicant

had taken appropriate action for 16 IPs (out of the 121 IPs alleged in the second charge);

(b) the statements of three witnesses recorded during the investigation (JIPS) and the applicant's first statement (JIPS) gave different numbers of IPs which were the subject matter of the second charge; and

(c) the 121 IPs as alleged in the second charge were also part of the 286 IPs which were the subject matter of the third charge. Hence, the applicant was unjustly charged twice for the 121 IPs.

(3) the applicant did not admit the third charge and stated as follows

(a) the third charge was defective. This was because the IP Register for the year of 2010, 2011, 2012 and 2014 stated that the applicant had taken appropriate action for 21 IPs (out of the 286 IPs alleged in the third charge);

(b) the third charge alleged 286 IPs but the statements of four witnesses recorded during the investigation (JIPS) and the applicant's first statement (JIPS) gave different numbers of IPs which were the subject matter of the third charge; and

(c) the 286 IPs which were stated in the third charge, were the same IPs for the first and second charges. Hence, the applicant averred that he was being unjustly charged thrice for the same facts.

(4) the applicant alleged that notwithstanding his application for documents in the applicant's letter (28 February 2020), he had not been provided with copies of the following documents:

(a) the front page and all the minutes of the 165 IPs (the subject matter of the first charge);

(b) the front page and all the minutes of the 121 IPs (the subject matter of the second charge); and

(c) the front page and all the minutes of the 286 IPs (the subject matter of the third charge),
('alleged documents (not provided to applicant)').

(5) Corporal Syamsuri was not a credible witness and the applicant had given reasons for the lack of credibility of Corporal Syamsuri; and

(6) the delay of almost six years and ten months in taking disciplinary action against the applicant, amounted to a condonation of his misconduct.

[24] On 5 February 2021:

(1) the second respondent met and deliberated regarding the three charges and applicant's representation; and

(2) the second respondent decided as follows:

(a) the applicant was found guilty of the three charges; and

(b) the applicant was dismissed from the Police Force with effect from 5 February 2021,
('second respondent's decision').

[25] The second respondent's decision was conveyed to the applicant by way of a letter dated 16 February 2021.

C. JUDICIAL REVIEW APPLICATION FILED BY THE APPLICANT IN THE HIGH COURT (JRA)

[26] The JRA was filed against the first respondent, second respondent and third respondent (third respondent). The third respondent is the Government of Malaysia. In this judgment, we shall refer to the first, second and third respondents collectively as the 'respondents'.

[27] In the JRA, the applicant applied for the following orders, among others:

(1) a declaration that:

(a) the IGSO have no force of law;

(b) all the circulars and SOP (standard operating procedure) administrative guidelines (circulars/guidelines) have force of law except when the circulars/guidelines apply to disciplinary proceedings under regs 4, 37, 37A, 37B, 37C and 37D of the PO(CD)R which may lead to a dismissal of a public officer;

(c) regs 37, 37A, 37B, 37C and 37D of the PO(CD)R are inconsistent with arts 132 and 135(2)of the FC and are therefore void to the extent of such an inconsistency pursuant to art 4(1) of the FC; and

(d) regs 37, 37A, 37B, 37C and 37D of the PO(CD)R contravene art 8 of the FC because regs 37, 37A, 37B, 37C and 37D of the PO(CD)R:

(i) do not provide for an appeal to the DAB against a DA's decision, unlike regs 10–15 and 17 of the PSDBR;

(ii) discriminate public officers in two categories of public services, namely, public services as enumerated in art 132(1) of the FC and public services as stipulated in art 135(2); and

(iii) are void under art 4(1) of the FC due to reasons stated in the above sub-paras (d)(i) and/or (ii).

(2) an order of certiorari to quash the second respondent's decision;

(3) an order of mandamus to reinstate the applicant as a public officer in his last posting as a confirmed and pensionable Inspector without any loss of seniority, salary increment, salary, emoluments and all other benefits;

(4) an order to assess all the applicant's arrears of salary, salary increments, emoluments, allowances and benefits which the applicant was entitled to from 5 February 2021 (date of the applicant's dismissal from the Police Force) until his reinstatement by a court order (assessed damages); and

(5) interest at the rate of 5%pa on the assessed damages from 5 February 2021 until full payment of the assessed damages.

[28] On 5 January 2023, the High Court dismissed the JRA without any order as to costs ('High Court's decision'). According to the High Court's written judgment, among others:

(1) the first charge was not defective because Annexure A to the first charge contained all the particulars of the 165 IPs (which constituted the subject matter of the first charge);

(2) the second and third charges stated the time periods during which the applicant was charged to have committed the disciplinary offences as stated in the second and third charges respectively;

(3) the applicant, as a police Inspector, was bound to comply with the IGSO and circulars/guidelines. If there is any breach of the IGSO and circulars/guidelines by a police officer, the police officer may have committed the following disciplinary offences:

(a) insubordination (*ingkar perintah*) under reg 4(2)(i) of the PO(CD)R;

(b) lack efficiency (*kurang cekap*) within the meaning of reg 4(2)(e) of the PO(CD)R;

(c) untrustworthy (*tidak amanah*) pursuant to reg 4(2)(f) of the PO(CD)R; and

(d) irresponsible (*tidak bertanggungjawab*) as understood in reg 4(2)(g) of the PO(CD)R.

(4) there was no breach of natural justice in this case because:

(a) the IP Registers contained all the particulars of the IPs which constituted the three charges; and

(b) copies of the IP Registers and all statements recorded in the investigation (JIPS) had been provided to the applicant. Hence, the applicant did not need the alleged documents (not provided to applicant).

(5) the three charges concerned three different disciplinary offences for which the applicant could be dismissed for each of the three charges. The three charges were therefore not tainted with illegality;

(6) the applicant did not adduce any evidence to prove that:

(a) the second respondent had not been lawfully constituted as a DA in this case; and

(b) the first respondent did not chair the DA which made the DA's decision in this case.

(7) premised on the Federal Court's judgment in *Public Prosecutor v Khong Teng Khen & Anor* [1976] 2 MLJ 166, there was no discrimination against the applicant because he was treated in the same manner as all the other police inspectors. The applicant could not be considered in the same class as the support group (who can appeal against a decision of the DA to the DAB).

[29] The applicant had lodged this appeal to the Court of Appeal against the High Court's decision ('this appeal').

D. ISSUES

[30] In addition to the two novel constitutional questions as stated in the above para 2, the following issues arise in this appeal:

(1) whether the three charges were defective as follows:

(a) the first charge did not state a time period during which the applicant was alleged to have committed the disciplinary offence as charged in the first charge;

(b) the number of IPs stated in the three charges differed from the number of IPs given in:

(i) the statements of witnesses recorded in the investigation (JIPS); and

(ii) the applicant's first statement (JIPS).

(c) the three charges overlapped (*bertindih*) regarding certain IPs. Hence,

A the applicant was unjustly charged and punished thrice for the same disciplinary offence.

(2) what is the effect of IGSO and circulars/guidelines?

B

(3) did the second respondent fail to supply the alleged documents (not provided to applicant) to the applicant?

(4) whether the applicant could prove that:

C

(a) the second respondent had not been lawfully constituted as a DA in this case; and

(b) the first respondent did not chair the DA which made the DA's decision in this case.

D

The above question concerns a discussion of ss 103 and 114(e) of the Evidence Act 1950 ('the EA').

E

(5) could the applicant rely on a defence of condonation of the three charges by the respondents? and

(6) whether the second respondent's decision was:

F

(a) 'illegal';

(b) tainted with 'procedural impropriety;

(c) 'irrational'; and/or

G

(d) 'disproportionate'.

E. WHETHER REGS 37, 37A, 37B, 37C AND 37D OF THE PO(CD)R HAVE CONTRAVENED ART 8(1) OF THE FC

H

[31] Reproduced below are:

(1) arts 4(1), 8(1), 132(1), (2), 135(2), 144(1), (5A) and (5B) of the FC;

(2) regs 34, 35, 37, 37A, 37B, 37C and 37D of the PO(CD); and

I

(3) regs 3(1), 12(1), 13 and 14 of the PSDBR:

FC

Supreme law of the Federation

Article 4(1) *[FC] is the supreme law of the Federation and any law passed after*

Merdeka Day which is inconsistent with [FC] shall, to the extent of the inconsistency, be void.

Equality

Article 8(1) *All persons are equal before the law and entitled to the equal protection of the law.*

Public services

Article 132(1) *For the purposes of [FC], the public services are —*

(a) the armed forces;

(b) the judicial and legal service;

(c) *the general public service of the Federation*;

(d) *the police force*;

...

(f) *the joint public services mentioned in Article 133*;

(g) the public service of each State; and

(h) the education service.

(2) *Except as otherwise expressly provided by [FC], the qualifications for appointment and conditions of service of persons in the public services other than those mentioned in paragraph (g) of Clause (1) may be regulated by federal law and, subject to the provisions of any such law, by the Yang di-Pertuan Agong*; and the qualifications for appointment and conditions of service of persons in the public service of any State may be regulated by State law and, subject to the provisions of any such law, by the Ruler or Yang di-Pertua Negeri of that State.

Restriction on dismissal and reduction in rank

Article 135(1) ...

(2) *No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard*:

Provided that this Clause shall not apply to the following cases:

(a) where a member of such a service is dismissed or reduced in rank on the ground of conduct in respect of which a criminal charge has been proved against him; or

(b) where the authority empowered to dismiss or reduce in rank a member of such a service is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to carry out the requirements of this Clause; or

(c) where the Yang di-Pertuan Agong, or, in the case of a member of the public service of a State, the Ruler or Yang di-Pertua Negeri of that State, is satisfied that in the interests of the security of the Federation or any part thereof it is

not expedient to carry out the requirements of this Clause; or

(d) where there has been made against a member of such a service any order of detention, supervision, restricted residence, banishment or deportation, or where there has been imposed on such a member any form of restriction or supervision by bond or otherwise, under any law relating to the security of the Federation or any part thereof, prevention of crime, preventive detention, restricted residence, banishment, immigration, or protection of women and girls:

Provided further that for the purpose of this Article, where the service of a member of such a service is terminated in the public interest under any law for the time being in force or under any regulation made by the Yang di-Pertuan Agong under Clause (2) of Article 132, such termination of service shall not constitute dismissal whether or not the decision to terminate the service is connected with the misconduct of or unsatisfactory performance of duty by such member in relation to his office or the consequences of the termination involved an element of punishment; and this proviso shall be deemed to have been an integral part of this Article as from Merdeka Day.

Functions of Service Commissions

Article 144(1) *Subject to the provisions of any existing law and to the provisions of [FC], it shall be the duty of a Commission to which this Part applies to* appoint, confirm, emplace on the permanent or pensionable establishment, promote, transfer and *exercise disciplinary control over members of the service or services to which its jurisdiction extends.*

(5A) *Save as provided in Clause (5B), federal law and, subject to the provisions of any such law, regulations made by the Yang di-Pertuan Agong may, notwithstanding the provisions of Clause (1) of Article 135, provide for the exercise by any officer in a service to which the jurisdiction of a Commission to which this Part applies extends, or by any board of such officers, of any of the functions of the Commission under Clause (1)*:

Provided that —

(a) no such law or regulation may provide for the exercise by any such officer or board of officers of any power of first appointment to the permanent or pensionable establishment, or of any power of promotion (other than promotion to an acting appointment); and

(b) any person aggrieved by the exercise by any such officer or board of officers of any power of disciplinary control may appeal to the Commission within such time and in such manner as may be prescribed by any such law or regulations, and the Commission may make such order thereon as it may consider just.

(5B)(i) Notwithstanding the provisions of Clause (1) of Article 135 and Article 139 and Article 141A, all the powers and functions of the Public Services Commission or the Education Service Commission established under Article 139 and Article 141A, other than the power of first

appointment to the permanent or pensionable establishment, may be exercised by a board appointed by the Yang di-Pertuan Agong.

(ii) *Any person aggrieved by the exercise by the board of any of the aforesaid powers or functions may appeal to an Appeal Board appointed by the Yang di-Pertuan Agong*.

(iii) *The Yang di-Pertuan Agong may by regulations provide for matters relating to the appointments of the members of, and the procedure to be followed by, the board or the Appeal Board under this Clause*.

(iv) Where the Yang di-Pertuan Agong has appointed the board under paragraph (i) of this Clause for the purpose of exercising any of the powers or functions referred to under that paragraph, such power or function shall so long as it remains a power or function to be exercised by the board, cease to be exercisable by the said Commission.

PO(CD)R

reg 34(1) *Subject to subregulation (2), no officer shall be dismissed or reduced in rank in any disciplinary proceedings under this Part unless he has first been informed in writing of the grounds on which such action is proposed and he has been afforded a reasonable opportunity of being heard.*

(2) Subregulation (1) shall not apply in the following cases:

(a) where an officer is dismissed or reduced in rank on the ground of conduct in respect of which a criminal charge has been proved against him;

(b) where the appropriate [DA] is satisfied that for some reason, to be recorded by it in writing, it is not reasonably practicable to carry out the requirements of subregulation (1);

(c) where the Yang di-Pertuan Agong is satisfied that in the interest of the security of the Federation or any part thereof it is not expedient to carry out the requirements of this regulation; or

(d) where there has been made against the officer any order of detention, supervision, restricted residence, banishment or deportation, or where there has been imposed on such officer any form of restriction or supervision by bond; or

(e) otherwise, under any law relating to the security of the Federation or any part thereof, prevention of crime, preventive detention, restricted residence, banishment, immigration, or protection of women and girls.

reg 35(1) *Where an officer is alleged to have committed a disciplinary offence —*

(a) *the Chairman of the [DA] appropriate to that officer*; or

(b) if there is more than one tier of [DA] in respect of such officer, the Chairman of the [DA] having the jurisdiction to impose a punishment other than dismissal or reduction in rank,

shall, before commencing any disciplinary proceedings in respect of the officer, consider and determine whether the disciplinary offence complained of is of a

nature which warrants a punishment of dismissal or reduction in rank or a punishment lesser than dismissal or reduction in rank.

(2) *If the Chairman of the [DA] referred to in paragraph (1)(a) or (b) determines that the disciplinary offence complained of is of a nature which warrants a punishment of dismissal or reduction in rank, he shall refer the case to the [DA] which has the power to impose such punishment.*

reg 37(1) *If it is determined under subregulation 35(2) that the disciplinary offence complained of against an officer is of a nature that warrants a punishment of dismissal or reduction in rank, the Chairman of the appropriate [DA] to which the case is referred shall consider all the available information. (2) If it appears to the Chairman of the appropriate [DA] that there exists a prima facie case against the officer, the Chairman of the appropriate [DA] shall consider all the available information.*

(2) *If it appears to the Chairman of the appropriate [DA] that there exists a prima facie case against the officer, the Chairman of the appropriate [DA] shall —*

(a) *direct that a charge containing the facts of the disciplinary offence alleged to have been committed by the officer and the grounds on which it is proposed to dismiss the officer or reduce his rank be sent to the officer; and*

(b) *require the officer to make, within a period of twenty-one days from the date he is informed by notice in accordance with regulation 52 of the charge, a written representation containing the grounds upon which he relies to exculpate himself.*

(3) If, after considering the representation made pursuant to subregulation (1), the appropriate [DA] is of the opinion that the disciplinary offence committed by the officer does not warrant a punishment of dismissal or reduction in rank, the appropriate [DA] may impose upon the officer any of the lesser punishments specified in regulation 38 as it deems appropriate.

(4) If the officer does not make any representation within the period specified in paragraph (2)(b), or if the officer makes such a representation but the representation does not exculpate himself to the satisfaction of the appropriate [DA], the [DA] shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

(5) If the appropriate [DA] is of the opinion that the case against the officer requires further clarification, the [DA] may establish an Investigation Committee for the purpose of obtaining such further clarification.

reg 37A(1) The Committee shall comprise not less than two officers.

(2) Members of the Investigation Committee shall be higher in rank than the officer under investigation but the Head of Department of the officer under investigation shall not be a member of the Investigation Committee.

reg 37B (1) The Investigation Committee —

(a) shall inform the officer under investigation of the date when the question of his dismissal or reduction in rank will be brought before the Investigation Committee; and

(b) may call and examine any witness or take any action as it thinks necessary and proper for obtaining further clarification regarding the case.

(2) If the Investigation Committee is of the view that the officer should be allowed to be present before the Investigation Committee to exculpate himself, the officer shall present himself before the Committee for such purpose.

(3) If witnesses are called and examined by the Investigation Committee, the officer shall be given an opportunity to be present and to Cross-examine the witnesses on his own behalf

(4) No documentary evidence shall be used against an officer unless the officer has previously been supplied with a copy of the evidence or given access to the evidence.

(5) The Investigation Committee may permit the Government or the officer to be represented by an officer in the public service or, in exceptional cases, by an advocate and solicitor, but the Investigation Committee may withdraw such permission subject to any reasonable and necessary adjournment to enable the officer to present his case in person.

(6) If the Investigation Committee permits the Government to be represented, it shall also permit the officer under investigation to be similarly represented.

(7) If the officer under investigation who is required to appear before the Investigation Committee fails to appear on the date and at the time appointed and if no sufficient ground is shown for an adjournment, the Investigation Committee may proceed to consider and decide on the complaint or may adjourn the proceeding to another date.

(8) Upon the completion of its investigation, the Investigation Committee shall submit a report on such investigation to the appropriate [DA].

(9) If the appropriate [DA] is of the opinion that the report submitted to it under subregulation (8) is vague in particular matters or that further investigation is required, the appropriate [DA] may refer the matter back to the Investigation Committee for further investigation.

reg 37C (1) If, in the course an investigation by the Investigation Committee, further grounds for the dismissal of the officer under investigation are disclosed, the Investigation Committee shall inform the appropriate [DA] of the further grounds.

(2) If the [DA] thinks fit to proceed against the officer on such further grounds, the officer shall be given a written statement of those grounds, and the procedures set out in regulations 37, 37A and 37B shall apply in respect of the further grounds as they apply in respect of the original grounds.

reg 37D *If, after considering the officer's representation and the report of the Investigation Committee, if any, the appropriate [DA] —*

(a) *finds the officer guilty of the disciplinary offence alleged to have been*

committed by him and that the officer should be dismissed or reduced in rank, the [DA] shall impose the punishment of dismissal or reduction in rank, as it deems appropriate;

(b) finds the officer guilty of the disciplinary offence alleged to have been committed by him but that, after taking into consideration the circumstances in which the disciplinary offence was committed and other mitigating factors, such offence does not warrant a punishment of dismissal or reduction in rank but warrants the imposition of a lesser punishment, the [DA] shall impose upon the officer any one or more of the punishments other than dismissal or reduction in rank as specified in regulation 38 as it deems appropriate; or

(c) finds the officer not guilty, the [DA] shall acquit him.

PSDBR

reg 3 *Functions of the Disciplinary Board*

(1) Subject to subregulations (2) and (3) of this regulation and to regulation 5, *the Disciplinary Board shall have jurisdiction in matters relating to the conduct and discipline of all persons specified in column 2 of the Schedule who are members of the services mentioned in paragraphs (c) and (f) of Clause (1) of Article 132 [FC]*.

reg 12 *Establishment of the [DAB]*

(1) *For the purpose of these Regulations there is hereby established a [DAB] consisting of members of the Public Services Commission for the time being appointed under Article 139 [FC].*

reg 13 *Functions of the [DAB]*

The functions of the [DAB] shall be to receive, consider and decide on any appeal made in accordance with the provisions of [PSDBR] with respect to any decision of the Disciplinary Board relating to the conduct and discipline of an officer in any of the services referred to In regulation 3.

reg 14 Appeal

An officer aggrieved by the decision of the Disciplinary Board established under subregulation 2(1) may appeal against such decision to the [DAB] established under regulation 12. (Emphasis added.)

[32] PO(CD)R are made by the Yang di-Pertuan Agong ('YDPA') under art 132(2) of the FC while the YDPA makes PSDBR pursuant to art 144(5B) of the FC.

[33] We will now discuss whether:

(1) a provision of written law;

(2) an executive policy, action and decision; and

(3) an administrative policy, action and decision (including a decision of DA,
(referred collectively in this judgment as the 'impugned matter')
– has breached art 8(1) of the FC.

[34] In the Federal Court case of *Khong Teng Khen*, at p 170, Suffian LP delivered the following 2–1 majority judgment:

> *Article 8 guarantees to all persons equality before the law and its equal protection. Regulations 6, 7, 13, 19, 20 and 21 prescribe rules of procedure and evidence different from those applicable under the Criminal Procedure Code and the [EA] and to that extent they are discriminatory, but as between all persons charged with security offences within the meaning of reg 2(1) they are not discriminatory and do not therefore offend against art 8, it would have been different if the regulations provide that some persons charged with security offences are to be subject to one set of rules and others charged with similar offences to another set of rules.*
>
> *The principle underlying art 8 is that a law must operate alike on all persons under like circumstances, not simply that it must operate alike on all persons in any circumstance, nor that it 'must be general in character and universal in application and that the State is no longer to have the power* of *distinguishing and classifying persons … for the purpose of legislation', Kedar Nath v State of West Bengal* AIR 1953 SC 404, 406. *In my opinion, the law may classify persons into children, juveniles and adults, and provide different criteria for determining their criminal liability or the mode of trying them or punishing them if found guilty; the law may classify persons into women and men, or into wives and husbands, and provide different rights and liabilities attaching to the status of each class; the law may classify offences into different categories and provide that some offences be triable in a magistrate's court, others in a sessions court, and yet others in the High Court; the law may provide that certain offences be triable even in a military court; fiscal law may divide a town into different areas and provide that ratepayers in one area pay a higher or lower rate than those of another area, and in the case of income tax provide that millionaires pay more tax than others; and yet in my judgment in none of these cases can the law be said to violate art 8. All that art 8 guarantees is that a person in one class should be treated the same* as *another person in the same class, so that a juvenile must be tried like another juvenile, a ratepayer in one area should pay the same rate as paid by another ratepayer in the same area, and a millionaire the same income tax as another millionaire, and so on.* (Emphasis added.)

The above judgment by Suffian LP was concurred by Wan Sulaiman FCJ, at p 176. Ong Hock Sim FJ dissented in *Khong Teng Khen*, at pp 171–176, but did not decide with regard to art 8(1) of the FC.

[35] *Khong Teng Khen* had been applied by the Federal Court in *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155. Suffian LP delivered the following judgment in *Datuk Haji Harun bin Idris*, at pp 165–166:

> 6. In India the first question they ask is, is there classification? If there is and subject

to other conditions, they uphold the law. If there is no classification, they strike it down.

With respect we would agree with the Solicitor-General's submission that the first question we should ask is, is the law discriminatory, and that the answer should then be — if the law is not discriminatory, if for instance it obviously applies to everybody, it is good law, but if it is discriminatory, then because the prohibition of unequal treatment is not absolute but is either expressly allowed by the constitution or is allowed by judicial interpretation we have to ask the further question, is it allowed? If it is, the law is good, and if it is not, the law is void.

7. *In India discriminatory law is good law if it is based on 'reasonable' or 'permissible' classification, using the words used in the passage reproduced above from the judgment in Shri Ram Krishna Dalmia AIR 1958 SC 538, provided that:*

(i) *the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and*

(ii) *the differentia has* a *rational relation to the objects ought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.*

The Solicitor-General submits that if the Indian doctrine of classification is to be accepted by our courts, which he argues has not been done, it may foe accepted subject to the modification that the courts should not take it upon itself to consider whether the classification is reasonable or not, a task which should be left to the Legislature. In our opinion the doctrine of classification should be accepted by our courts, subject to what we said in para 6 above. We adhere to what was said in Public Prosecutor v Khong Teng Khen ...

...

As regards the narrower question whether or not the courts should leave it to the Legislature alone to go into the reasonableness of the classification, we think that the court should not, that in other words the court should consider the reasonableness of the classification. (Emphasis added.)

The test laid down in *Datuk Haji Harun bin Idris* is known as the 'reasonable classification test'. Premised on the reasonable classification test, if an impugned matter provides for different classes and different treatment for different classes, the impugned matter is not discriminatory and does not therefore infringe art 8(1) of the FC if the following three conditions are fulfilled cumulatively:

(1) the impugned matter provides for the same treatment for all persons in the same class ('first condition (reasonable classification test)');

(2) there is an 'intelligible differentia' (reasonable, rational or logical basis) for the provision of different classes and different treatment of different

classes by the impugned matter, namely, there is a reasonable classification basis ('second condition (reasonable classification test)'); and

(3) there exists a nexus between the reasonable classification basis and the object of the impugned matter 'third condition (reasonable classification test)').

[36] It is to be noted that when *Khong Teng Khen* and *Datuk Haji Harun bin Idris* were decided, our Parliament had abolished appeals to the Privy Council on constitutional and criminal matters. In other words, the Federal Court which decided *Khong Teng Khen* and *Datuk Haji Harun bin Idris* was our apex court then.

[37] The reasonable classification test has been applied by our highest court in the following cases (in chronological order):

(1) in the Supreme Court case of *Malaysian Bar & Anor v Government of Malaysia* [1987] 2 MLJ 165, both the 2–1 majority judgment (delivered by Mohd Azmi SCJ, at p 170) and dissenting judgment (by Salleh Abas LP, at pp 167–168), had applied the reasonable classification test;

(2) the following judgments in the Federal Court case of *Abdul Ghani bin Ali Ahmad & Ors v Public Prosecutor* [2001] 3 MLJ 561:

   (a) the decision of Abdul Malek Ahmad FCJ (as he then was), at pp 579–581; and

   (b) Ahmad Fairuz FCJ's (as he then was) judgment, at pp 594–596.

(3) the judgment of the Federal Court delivered by Augustine Paul JCA (as he then was) in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257, at [35] to [40] and [47] to [50].

[38] In the Federal Court case of *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1, Richard Malanjum CJ had added the condition of 'proportionality' ('proportionality condition') in deciding whether an impugned matter has complied with art 8(1) of the FC. According to *Alma Nudo Atenza*, at [142] to [145] and [150]:

> [142] *Next to consider is whether the incursion into the presumption of innocence under art 5(1) satisfies the requirement of proportionality housed under art 8(1).*
>
> [143] T*he first stage in the proportionality assessment is to establish whether there is a sufficiently important objective to justify the infringement of the right, in this case the right to presumption of innocence.* The legislative objective in inserting s 37A is to overcome the problem of the prosecution failing to prove the element of trafficking as defined in the DDA. Drug trafficking has been a major problem in the country.

A It needs to be curbed. One way is to secure convictions of drug traffickers which can be considered a sufficiently important objective and one which is substantial and pressing,

B [144] *The second stage of the inquiry is to consider whether the means designed by Parliament has a rational nexus with the objective it is intended to meet.* The effect of s 37A, as elaborated above, is to shift the burden of proof to an accused on the main elements of possession, knowledge, and trafficking, provided that the prosecution establishes first the relevant basic facts. It is at least arguable that the resulting ease of securing convictions is rationally connected to the aim of curbing the vice of drug trafficking. Bearing in mind that the validity of individual presumptions are not in C issue in the present appeals, it is not necessary for us to analyse the rational connection between custody and control on one hand and possession and knowledge on another, or the connection between possession and trafficking (see *R v Oakes* at para 78).

D [145] *The third stage of the inquiry requires an assessment of proportionality. It must be emphasised any restriction of fundamental rights does not only require a legitimate objective, but must be proportionate to the importance of the right at stake.*

...

E [150] *Based on the factors above — the essential ingredients of the offence, the imposition of a legal burden, the standard of proof required in rebuttal, and the cumulative effect of the two presumptions — we consider that s 37A constitutes a most substantial departure from the general rule, which cannot be justified and disproportionate to the legislative objective it serves. It is far from clear that the objective cannot be achieved through other means less damaging to the accused's fundamental right under art 5. In light of the* F *seriousness of the offence and the punishment it entails, we find that the unacceptably severe incursion into the right of the accused under art 5(1) is disproportionate to the aim of curbing crime, hence fails to satisfy the requirement of proportionality housed under art 8(1).* (Emphasis added.)

G **[39]** The proportionality condition had been adopted by Tengku Maimun CJ in the Federal Court in *Ketheeswaran a/l Kanagaratnam & Anor v Public Prosecutor* [2024] 1 MLJ 851, at [130] to [133], as follows:

H [130] *The jurisprudence of art 8(1) is beyond settled. In order to achieve equality in the truest sense of art 8, decided cases have held that discrimination is allowed except in certain cases.* In relation to art 8(2), discrimination only on the grounds stated in that article is prohibited against citizens unless expressly authorised by the FC. However, if an argument is made in respect of art 8(1), then the following must be shown.

I [131] *Firstly, there must be an intelligible differentia between the categories of persons (or classes of persons) that are classified within a certain group against persons (or classes of persons) who can be clearly classified outside of that group, In other words, the discrimination must be intelligible and clear not arbitrary or wanton. The first element of art 8(1) looks for a clear distinction between who is discriminated. This assessment ensures that the discrimination is not done arbitrarily.*

[132] *The second element of art 8(1) which is usually the one at issue in most cases, looks at the basis of discrimination. Here, it must be established that the differentiation in the first element was enacted in furtherance of a legitimate legislative aim and that there is a reasonable nexus between the discrimination and that legislative aim, If there is no objective and justifiable reason for the discrimination, then in such a circumstance, the measure will have violated art 8(1).*

[133] *In relation to the second element, more recent cases decided in the past few decades such as Alma Nudo, also emphasise the importance of proportionality in the assessment of the measure, In other words, even if the legislative measure which is discriminatory was pursued for a legitimate aim, the measure may still be violative of art 8(1) if the extent of the measure taken is disproportionate to the legitimate legislative aim it seeks to achieve.* (Emphasis added.)

[40] Part V of the PO(CD)R (which includes regs 37, 37A, 37B, 37C and 37D of the PO(CD)R) had been introduced by the Public Officers (Conduct and Discipline) (Amendment) Regulations 2002.

[41] Police officers are public officers in the Police Force as provided in art 132(1)(d) of the FC ('Class (Police Officers)'). PO(CD)R apply to the Class (Police Officers) by virtue of reg 2(1) of the PO(CD)R and the definition of 'officer'? in reg 3 of the PO(CD)R. Reproduced below are reg 2(1) of the PO(CD)R and the definition of 'officer' in reg 3 of the PO(CD)R:

reg 2 Application

(1) *[PO(CD)R] shall apply to an officer throughout the period of his service* and, in respect of an officer who has not opted into the New Remuneration System, shall apply with such modifications as are necessary and proper having regard to the terms and conditions of his service.

reg 3 Interpretation

In [PO(CD)R], unless the context otherwise requires —

...

'officer' means a member of the public service of the Federation; (Emphasis added.)

[42] According to reg 3(1) of the PSDBR, PSDBR apply to the following class of public officers:

(1) public officers in the 'general public service of the Federation' (art 132(1)(c) of the FC); and

(2) public officers in the 'joint public services mentioned' in art 133 of the FC of the (art 132(1)(f) of the FC),
('class (general public service/joint public services)').

[43] If a member of the Class (Police Officers) is found guilty of a

disciplinary offence and punished by a DA under reg 37D(a) or (b) of the PO(CD)R, PO(CD)R do not provide a right of appeal against such a decision of the DA to the DAB ('no right to appeal (DAB)'). This legal position regarding the Class (Police Officers) is to be contrasted with the case when a member of the class (general public service/joint public services) (X) is found guilty of a disciplinary offence and punished by the relevant DB ('DB's decision'). X has a right under reg 14 of the PSDBR to appeal against the DB's decision to the DAB ('right to appeal (DAB)').

[44] The first constitutional question raised in this appeal is whether regs 37, 37A, 37B, 37C and 37D of the PO(CD)R have contravened art 8(1) of the FC and are therefore void pursuant to art 4(1) of the FC because:

(1) regs 37, 37A, 37B, 37C and 37D of the PO(CD)R have discriminated against police officers who:

(a) have been found guilty of disciplinary offences by a DA;

(b) have been punished by the DA; and

(c) have no right to appeal (DAB).

(2) all members of the class (general public service/joint public services) have a right to appeal (DAB) against the decisions of the relevant DB which have:

(a) found them to be guilty of disciplinary offences; and

(b) punished them.

[45] We are of the view that regs 37, 37A, 37B, 37C and 37D of the PO(CD)R have not discriminated against police officers vis a vis members of the class (general public service/joint public services). Our reasons are as follows:

(1) by virtue of regs 37, 37A, 37B, 37C and 37D of the PO(CD)R, all members of the Class (Police Officers) have no right to appeal (DAB). In other words, all police officers, irrespective of their rank, race, gender and age, are treated equally by regs 37, 37A, 37B, 37C and 37D of the PO(CD)R in the sense that police officers have no right to appeal (DAB). Hence, the first condition (reasonable classification test) is fulfilled with regard to regs 37, 37A, 37B, 37C and 37D of the PO(CD)R;

(2) there is an 'intelligible differentia' between:

(a) the Class (Police Officers) which has no right to appeal (DAB); and

(b) the class (general public service/joint public services) which has a right to appeal (DAB). A

There is a reasonable classification basis because:

(i) ss 3(3) and 20(3) of the Police Act 1967 ('the PA') prescribe the following statutory duties for all police officers ('Statutory Duties (Police Officers)'): B

> s 3(3) *The [Police Force] shall subject to [PA] be employed in and throughout Malaysia (including the territorial waters thereof) for the maintenance of law and order, the preservation of the peace and security of Malaysia, the prevention and detection of crime, the apprehension and prosecution of offenders and the collection of security intelligence.* C
>
> s 20(3) *Without prejudice to the generality of the foregoing provisions or any other law, it shall be the duty of a police officer to carry out the purposes mentioned in subsection 3(3); and he may take such lawful measures and do such lawful acts as may be necessary in connection therewith, including —* D
>
> (a) *apprehending all persons whom he is by law authorized to apprehend;*
>
> (b) *processing security intelligence;* E
>
> (c) *conducting prosecutions;*
>
> (d) *giving assistance in the carrying out of any law relating to revenue, excise, sanitation, quarantine, immigration and registration;*
>
> (e) *giving assistance in the preservation of order in the ports, harbours and airports of Malaysia, and in enforcing maritime and port regulations;* F
>
> (f) executing summonses, subpoenas, warrants, commitments and other process lawfully issued by any competent authority;
>
> (g) *exhibiting information;* G
>
> (h) protecting unclaimed and lost property and finding the owners thereof;
>
> (i) seizing stray animals and placing them in a public pound;
>
> (j) *giving assistance in the protection of life and property;* H
>
> (k) protecting public property from loss or injury;
>
> (l) *attending the criminal courts and, if specially ordered, the civil courts, and keeping order therein; and*
>
> (m) *escorting and guarding prisoners and other persons in the custody of the police.* (Emphasis added.) I

Unlike members of the class (general public service/joint public services), police officers have onerous Statutory Duties (Police Officers);

(ii) according to s 19 of the PA:

A s 19 *Police officer to be deemed on duty*

Every police officer, extra police officer and watch constable s*hall, for the purposes of [PA], be deemed to be always on duty when required to act as such and shall perform the duties and exercise the powers granted to him under this Act or any other law at any place in Malaysia where he may be doing duty.* (Emphasis added.)

B By reason of s 19 PA, all police officers are 'deemed to be always on duty' at any place in this country ('Police Officers' duty (at all times/at any place)'). Members of the class (general public service/joint public services) have no duty which is equivalent to the Police Officers' duty (at all times/at any place); and

C (iii) all police officers are required by s 13 of the PA to take an oath prescribed in the Second Schedule to the PA ('declaration (Police Officers)') as follows:

D DECLARATION OF OFFICE

I, (name), do solemnly, sincerely and truly declare that I will well and faithfully serve as ... (appointment) of the Royal Malaysia Police and will obey, uphold and maintain the laws of Malaysia, and that I will execute the powers and duties of my office honestly and diligently. (Emphasis added.)

E In view of the Statutory Duties (Police Officers), Police Officers' duty (at all times/at any place) and declaration (Police Officers), all members of the Class (Police Officers) should realise the importance of maintaining their discipline and if a DA finds the commission of disciplinary offence(s) by them and has imposed punishment, there is no right to appeal (DAB).

F As explained above, there is a reasonable classification of the following two classes:

(1A) members of the Class (Police Officers) who have no right to appeal G (DAB); and

(1B) members of the class (general public service/joint public services) who possess a right to appeal (DAB),
('reasonable classification (Class (Police Officers) — class (general public service/joint public services))'). Accordingly, the second H condition (reasonable classification test) is fulfilled in this case; and

I (3) the title of Part V of the PO(CD)R is 'Disciplinary Procedure'. The two objects of Part V PO(CD)R (which includes regs 37, 37A, 37B, 37C and 37D) is to ensure that disciplinary proceedings are conducted by a DA in a just and expeditious manner ('twin objects (Part V of the PO(CD)R)').

There is a nexus between the reasonable classification reasonable classification

(Class (Police Officers) — class (general public service/joint public services)) and the twin objects (Part V of the PO(CD)R) because:

(a) even though there is no right to appeal (DAB), disciplinary proceedings can still be carried out by a DA in a just manner against the police officers in question. In any event, police officers who have been found guilty and punished by a DA, have a right to file JRAs in the High Court against such decisions by the DA; and

(b) with no right to appeal (DAB), disciplinary proceedings can be concluded expeditiously.

As explained above, the third condition (reasonable classification test) has been satisfied in this case; and

(4) the fact that members of the Class (Police Officers) have no right to appeal (DAB), in itself, does not mean that Part V of the PO(CD)R is disproportionate in effect. Furthermore, the reasons stated in the above sub-para (3) support our decision that the proportionality condition has been fulfilled with regard to Part V of the PO(CD)R (which has no right to appeal (DAB)).

Premised on the above reasons, we have no hesitation to hold that regs 37, 37A, 37B, 37C and 37D of the PO(CD)R do not breach art 8(1) of the FC on the sole ground that PO(CD)R do not provide for a right to appeal (DAB).

[46] Our decision in the above para 45 is fortified by the following judgment of the Federal Court delivered by Ramli Ali FCJ in *Vijayarao a/l Sepermaniam v Suruhanjaya Perkhidmatan Awam Malaysia* [2018] 12 MLJ 17; [2018] 9 CLJ 141, at [4], [35] to [43] and [90]:

> [4] *Leave to appeal to this court was granted on 19 June 2017 on the following questions*:
>
> (i) *whether the appellant had the constitutional right to appeal to the [DAB] against the decision of the PSC under art 144(5B)(ii) [FC]? (question 1); and*
>
> (ii) *whether in view of art, 132(1)(c) [FC], the appellant ought not to be dismissed from public service without being given a reasonable opportunity of being heard which includes the right of appeal as provided by art. 144(5B)(ii) [FC] and reg. 14 [PSDBR]. (question 2)*
>
> ...
>
> [35] *In the exercise of the powers conferred by [Article 144(5B)(i) FC], the [YDPA] made the [PSDBR] which came into force on 15 December 1993. The [DB] was established under reg, 2(1) [PSDBR]. Under reg 3(1) [PSDBR], the [DB] has jurisdiction in matters relating to the conduct and discipline of all persons specified in*

Column 2 of the Schedule who are members of the services mentioned in paras, (c) and (f) of art 132(1) [FC].

[36] *Paragraph (c) of art 132(1) refers to the general public service of the Federation. The appellant in the present appeal was in this category.*

[37] *The jurisdictions of the [DB] are found in Column 3 of the Schedule to the [PSDBR]. In Column 3, except for the [DB] for the Support Group (No 1) which provides for disciplinary action with a view to dismissal or reduction in rank, the jurisdiction over all other categories of officers only relates to disciplinary action not with a view to dismissal or reduction in rank.*

[38] *Thus, the power to dismiss or reduce in rank an officer in the Top Management Group and the Managerial and Professional Group can only be exercised by the PSC, the respondent in the present appeal. This is clearly provided for in reg 5(1) [PSDBR], The [DB] established under reg 2(1) has no such power or jurisdiction to deal with such proceedings.*

[39] *The [DAB] was established under reg 12(1) [PSDBR]. Regulation 13 provides for the functions of the [DAB]* ...

...

[40] *Under reg 14 [PSDBR], an officer aggrieved by the decision of the [DB] established under reg 2(i) may appeal against such decision to the [DAB] established under reg 12 [PSDBR].*

[41] Learned counsel for the appellant argued that the appellant's right to an appeal is provided for by art 144(5B)(ii) [FC]; and therefore the appellant has the right to appeal against the decision of the PSC to [DAB] appointed by the [YDPA].

[42] *The disciplinary proceeding against the appellant, which resulted in his dismissal from the public service, was initiated and conducted by the PSC in its capacity as a [DB] by virtue of its powers under reg 5(1) [PSDBR]. It has the necessary jurisdiction to do so. There is nothing improper in law. This is because the PSC is the only body or authority empowered to deal with matters involving disciplinary proceedings against an officer in the Managerial and Professional Group with a view to dismissal or reduction in rank. There is no avenue for appeal provided for in the PSDBR. If the appellant is aggrieved with the decision of the PSC in dismissing him, he has the liberty to apply for judicial review at the High Court as what had been done in the present case.*

[43] *To conclude on this issue, we agree with the submission of learned SFC that the reliance by the appellant solely on art 144(5B)(ii) [FC] is not correct. It was based on a misconstrued interpretation of that provision. We are of the view that the appellant was never denied the right to appeal in the present case as the powers and functions provided for under art 144(5A) and (SB) [FC] read together with the provisions of and Schedule to the [PSDBR] did not provide for such powers, to receive, hear, consider and decide on any appeal. Therefore we answer question 1 in the negative, ie, that on the facts of the present case, the appellant had no constitutional right to appeal to the Appeal Board against the decision of the PSC under art 144(5B)(ii) [FC].*

...

[90] *For the reasons stated above, we answer question 1 in the negative in that the*

appellant was not entitled to nor has any right to appeal to the [DAB] against the decision of the PSC in dismissing him from the service. The [DAB] has no jurisdiction or powers to deal with disciplinary proceedings involving an officer (such as the appellant) who was in the Managerial and Professional Group. If the appellant is aggrieved with the decision of the PSC in dismissing him, his avenue is to file the necessary application for judicial review at the High Court. (Emphasis added.)

F. WHETHER REGS 37, 37A, 37B, 37C AND 37D OF THE PO(CD)R ARE INCONSISTENT WITH ARTS 132 AND 135 OF THE FC

[47] We cannot accept the submission by the applicant's learned counsel that regs 37, 37A, 37B, 37C and 37D of the PO(CD)R are inconsistent with arts 132 and 135 of the FC. On the contrary, reg 37(2)(b) of the PO(CD)R has expressly conferred a right on a police officer who is charged with a disciplinary offence which warrants a punishment of dismissal or reduction in rank (Y), to make a written representation containing the grounds on which Y relies to exculpate himself of the charge. It is thus clear that reg 37(2)(b) of the PO(CD)R is consistent with art 135(2) of the FC (no public officer 'shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard').

G. WHETHER THERE ARE THREE OR FOUR GROUNDS FOR JUDICIAL REVIEW

[48] It is trite law that there are three grounds for judicial review ('three grounds (JR)'), namely:

(1) if an impugned matter is illegal;

(2) if there is procedural impropriety regarding an impugned matter; and

(3) if an impugned matter is 'irrational'.

[49] In *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629, at [15], Raus Sharif FCJ (as he then was) had delivered the following judgment of the Federal Court:

[15] ... *Historically, judicial review was only concerned with the decision-making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroad into this field of administrative law. Rama Chandran is the mother of all those cases, The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality' which permits the courts to scrutinise the decision not only for process but also for substance, It allowed the courts to go into the merit of the matter. Thus, the distinction between review and appeal no longer holds.* (Emphasis added.)

Ranjit Kaur had recognised the possibility of 'disproportionality' as the fourth ground for judicial review,

[50] In *Shariffah Masturah bt Mohamad Japara v Pengerusi Lembaga Tatatertib Kumpulan Sokongan (No 1) Jabatan Imigresen Malaysia, Putrajaya & Ors* [2020] MLJU 220; [2020] 6 MLRH 35 at [39], the High Court had expressed the following doubt on whether 'disproportionality' is a fourth ground for judicial review:

> [39] *As explained in Ranjit Kaur, at [15], Malaysian case law has yet to recognise 'disproportionality' as a separate ground for judicial review. Even the legal position in the United Kingdom (UK) regarding 'disproportionality' is not settled, I refer to the majority judgment of Lord Neuberger P in UK's Supreme Court in Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2016] 4 All ER 794, *at [131]–[133], as follows:*
>
> *The argument based on proportionality*
>
> [131] *The appellants raise the argument that the time has come to reconsider the basis on which the courts review decisions of the executive, and in particular that the traditional Wednesbury rationality basis for challenging executive decisions should be replaced by a more structured and principled challenge based on proportionality. … In other words, the appellants contend that the four-stage test identified by Lord Sumption and Lord Reed in Bank Meliat v HM Treasury (No 2)* [2013] UKSC 39; [2013] 4 All ER 533; [2014] AC 700 *(at [20] and [74]) should now be applied in place of rationality in all domestic judicial review cases.*
>
> [132] *It would not be appropriate for a five-Justice panel of this court to accept, or indeed to reject, this argument, which potentially has implications which are profound in constitutional terms and very wide in applicable scope. Accordingly, if a proportionality challenge to the refusal to hold an inquiry would succeed, then it would be necessary to have this appeal (or at any rate this aspect of this appeal) re-argued before a panel of nine Justices. However, in my opinion, such a course is unnecessary because I consider that the appellants' third line of appeal would fail even if it was and could be based on proportionality.*
>
> [133] *The move from rationality to proportionality, as urged by the appellants, would appear to have potentially profound and far-reaching consequences, because it would involve the court considering the merits of the decision at issue: in particular, it would require the courts to consider the balance which the decision-maker has struck between competing interests (often a public interest against a private interest) and the weight to be accorded to each such interest see R v Secretary of State for the Home Dept, ex p Daly* [2001] UKHL 26; [2001] 3 All ER 433; [2001] 2 AC 53 (at [27]) *per Lord Steyn*. However, it is important to emphasise that it is no part of the appellants' case that the court would thereby displace the relevant member of the executive as the primary decisionmaker as to which see per Lord Sumption and Lord Reed in *Bank Meliat (No 2)* at paras [21] and [71] respectively, *Furthermore, as the passages cited by Lord Kerr from Kennedy v Charity Commission* [2014] UKSC 20; [2014] 2 All ER 847; [2015] AC 455 (at [51] and [54]), and *Pham v Secretary of State for the Home Dept* [2015] UKSC 19; [2015] 3 All ER 1015; [2015] 1 WLR 1591 (at [96] [113] and [115]) *show, the domestic law may*

already be moving away to some extent from the irrationality test in some cases. (Emphasis added.)

The judgment of the High Court in *Shariffah Masturah* had been affirmed on appeal to the Court of Appeal However, there is no written judgment of the Court of Appeal in *Shariffah Masturah*.

We should add that in the Court of Appeal case of *Ezaky Mulya bin Sapawi v Dato' Sri Nadzri Siron Pengerusi Lembaga Tatatertib Kumpulan Sokongan (No 1) Jabatan Pengangkutan Jalan Malaysia & Ors* [2022] 5 MLJ 472, See Mee Chun JCA had expressed the view that 'disproportionality' is a fourth ground for judicial review, It was decided in *Ezaky Mulya*, at [84] to [86], as follows:

[84] *We agree with the appellant that proportionality can be a ground for judicial review. Support for this proposition can be found in Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1 at p 15; [2010] 8 CLJ 629 and *Telekom Malaysia at p 305 where both cases referred to R Rama Chandran v The Industrial Court Of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147.

[85] *Although the HCJ ('High Court judge') was doubtful whether proportionality or disproportionality could be a fourth ground for judicial review, it was stated at para 68 of the judgment as follows:*

68 *Even if it is assumed that 'disproportionality' is a separate ground for judicial review of DA's decision and DAB's decision, I find that these decisions are not 'disproportionate' in their effect (resulting in the applicant's dismissal)*. This is because:

(1) the applicant had been guilty of a serious disciplinary offence consisting or 116 transactions which spanned over a period of more than six months (from 14 December 2012 until 4 September 2012);

(2) the applicant had abused his public position of personal advantage within the meaning of reg 4(2)(c)(ii) [PO(CD)R]; and

(3) the applicant's punishment will deter all other public officers from committing the same or similar disciplinary offence in the future.

[86] *On the factual matrix, there were therefore ample grounds to find that the punishment was proportionate to the charge.* (Emphasis added.)

H. WERE THE THREE CHARGES DEFECTIVE?

[51] Firstly, reg 37(2)(a) of the PO(CD)R requires a charge of a disciplinary offence which warrants a punishment of dismissal or reduction in rank, to contain the following two matters:

(1) the charge shall contain the 'facts of the disciplinary offence alleged to have been committed' by the public officer; and

(2) the grounds on which it is proposed to dismiss or reduce the rank of the public officer,
('two elements (charge)').

The two elements (charge) are mandatory because an imperative term 'shall' is employed in reg 37(2) of the PO(CD)R.

[52] If a charge lacks one or both of the two elements (charge), the charge is defective and unlawful according to reg 37(2)(a) of the PO(CD)R. On this ground alone, a decision of the DA which has dismissed or reduced the rank of a public officer pursuant to the defective charge, may be quashed by an order of certiorari on the ground of illegality, one of the three grounds (JR).

[53] Secondly, we have perused the three charges in this case. We are satisfied that the three charges had fulfilled the two elements (charge) as follows:

(1) the three charges had clearly stated the facts of the three disciplinary offences alleged to have been committed by the applicant ('facts (three disciplinary offences)'); and

(2) the grounds on which the DA proposed to punish the applicant for the three disciplinary offences ('grounds (three disciplinary offences)') had been provided in the three charges as follows:

(a) in the first charge, the applicant was guilty of insubordination (*ingkar perintah*) under reg 4(2)(i) of the PO(CD)R;

(b) according to the second charge, the applicant lacked industry (*kurang berusaha*) within the meaning of reg 4(2)(e) of the PO(CD)R; and

(c) the third charge alleged that the applicant was irresponsible (*tidak bertanggungjawab*) as understood in reg 4(2)(g) of the PO(CD)R.

[54] In view of the reasons explained in the above para 53, we cannot accede to the submission by the applicant's learned counsel that the three charges were defective. For the sake of completeness, we add as follows:

(1) if a charge has clearly stated the facts of the disciplinary offence as required by reg 37(2)(a) of the PO(CD)R, the charge is not required to state a time period. Hence, the fact that the first charge did not state a time period during which the applicant was alleged to have committed the disciplinary offence as charged in the first charge, did not make the first charge defective;

(2) the fact that the number of IPs stated in the three charges differed from the number of IPs given in:

(a) the statements of witnesses recorded in the investigation (JIPS); and

(b) the applicant's first statement (JIPS),
– did not make the three charges defective because the facts (three disciplinary offences) and grounds (three disciplinary offences) had been clearly stated in the three charges;

(3) the three charges concerned three different disciplinary offences under reg 4(2)(i), (e) and (g) of the PO(CD)R respectively. The fact that all the three charges had relied on certain IPs, did not detract from the fact that each disciplinary offence as alleged in each of the three charges is distinct;

(4) the applicant's letter (10 June 2020) stated that the applicant had to discuss the documents (requested by applicant) with his lawyers. Hence, the applicant had sought legal advice regarding the three charges. If the three charges were indeed defective ('alleged defects (three charges)'), the applicant (after being legally advised) would have informed the first and second respondents of the alleged defects (three charges) before the applicant's representation was sent; and

(5) if the alleged defects (three charges) were true, we fail to see how a lengthy and detailed applicant's representation of 52 pages could have been furnished in this case.

I. WHAT IS THE EFFECT OF IGSO AND CIRCULARS/GUIDELINES?

[55] Reproduced below is s 97 of the PA:

> s *97 Standing Orders*
>
> *The Inspector General may issue administrative orders, to be called 'Standing Orders', not inconsistent with [PA] or rules or Police Regulations made thereunder, for the general control, direction and information of the Force and of ail bodies established or raised for police duties under [PA]*. (Emphasis added.)

[56] According to s 97 of the PA, IGSO are 'administrative orders' issued by the IG for the 'general control and 'direction' of police officers. If any police officer breaches any IGSO (Z), Z may have committed the following disciplinary offences:

(1) Z has conducted himself or herself in such a manner as to bring the Police Force into disrepute or bring discredit to the Police Force as understood in reg 4(2)(d) of the PO(CD)R;

(2) Z lacks efficiency or industry under reg 4(2)(e) of the PO(CD)R;

(3) Z is dishonest or untrustworthy pursuant to reg 4(2)(f) of the PO(CD)R;

(4) Z is irresponsible within the meaning of reg 4(2)(g) of the PO(CD)R;

(5) Z has committed insubordination by not carrying out the IGSO as understood in reg 4(2)(i) of the PO(CD)R; and/or

(6) Z may be negligent in performing Z's duties pursuant to reg 4(2)(j) of the PO(CD)R.

[57] If there is a breach of circulars/guidelines by Z, Z may have committed the disciplinary offences as enumerated in the above para 56.

[58] In view of the Police Officers' duty (at all times/at any place), IGSO and circulars/guidelines are important to ensure the discipline of police officers is maintained so as to:

(1) fulfil the statutory duties (Police Officers); and

(2) give effect to the declaration (Police Officers).

[59] Premised on the reasons stated in the above paras 56–58, we have no hesitation to reject the following contentions by the applicant's learned counsel that:

(1) IGSO have no force of law; and

(2) the circulars/guidelines have force of law except when the circulars/guidelines apply to disciplinary proceedings under regs 4, 37, 37A, 37B, 37C and 37D of the PO(CD)R which may lead to a dismissal of a public officer.

J. DID THE SECOND RESPONDENT FAIL TO SUPPLY THE ALLEGED DOCUMENTS (NOT PROVIDED TO APPLICANT)?

[60] The first respondent affirmed an affidavit on 22 November 2021 ('first respondent's affidavit'). According to sub-para 14(a) of the first respondent's affidavit, the respondents did not have possession of the alleged documents (not provided to applicant) because the IPs (the subject matter of the three charges) were not handed over by the applicant. It is to be noted that the first respondent was the IG at the time of the affirmation of the first respondent's affidavit and would have been aware of the penal consequences of affirming a false affidavit under s 191 of the Penal Code ('the PC') which is punishable under the first limb of s 193 of the PC (with imprisonment up to seven years and/or fine). On this ground alone, we find no merit in the contention of the applicant's learned counsel that the respondents failed to supply the alleged documents (not provided to applicant).

[61] We find the applicant's reliance on the alleged documents (not provided

to applicant) to be an afterthought which was used to prop up unlawfully the JRA and this appeal because:

(1) the applicant did not request for the alleged documents (not provided to applicant) before the applicant's two statements (JIPS) were made in the course of the investigation (JIPS); and

(2) when the document (requested by applicant) were handed over to the applicant on 5 May 2020 (by way of the first respondent's letter (19 March 2020)), the applicant had the benefit of legal advice (please refer to the applicant's letter (10 June 2020)). If the alleged documents (not provided to applicant) were relevant:

   (a) the applicant's letter (10 June 2020) (which applied for a second extension of time to provide a written representation against the three charges) would have demanded for the alleged documents (not provided to applicant); and

   (b) before sending the applicant's representation, the applicant could have applied a second time for the alleged documents (not provided to applicant).

[62] As explained in the above paras 60 and 61, there was no suppression of documents by the respondents in this case. Consequently, this court cannot draw an adverse inference under s 114(g) of the EA against the respondents with regard to the alleged documents (not provided to applicant) please refer to the Supreme Court's judgment delivered by Mohd Azmi SCJ in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, at 494.

K. COULD THE APPLICANT COMPLAIN REGARDING THE UNLAWFUL CONSTITUTION OF THE SECOND RESPONDENT AND THE FACT THAT THE FIRST RESPONDENT DID NOT CHAIR THE SECOND RESPONDENT WHICH MADE THE SECOND RESPONDENT'S DECISION?

[63] Sections 103 and 114(g) of the EA state as follows:

s 103 *Burden of proof as to particular fact*

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

s 114 *Court may presume existence of certain fact*

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and *public* and private *business, in their relation to the facts of the particular case.*

ILLUSTRATIONS

A ...

(e) that judicial and o*fficial acts have been regularly performed*;

... (Emphasis added.)

B **[64]** According to s 114(e) of the EA, there is a rebuttable presumption that:

(1) the DA which heard the three charges against the applicant, had been lawfully constituted; and

C (2) the first respondent had been appointed validly as the second respondent's chairman.

[65] No evidence had been adduced by the applicant to rebut the rebuttable presumption as stated in the above para 64.

D **[66]** In para 5 of the first respondent's affidavit, the first respondent had affirmed that he was appointed to be the chairman of the DA by virtue of a gazette notification. The first respondent further averred in sub-para 6(i) of the first respondent's affidavit that the DA had met regarding this case on 5 February 2021. By reason of s 103 of the EA, the applicant had the evidential E onus to disprove these sworn averments of the first respondent. However, no evidence had been adduced by the applicant to show that the first respondent did not chair the DA on 5 February 2021 when the DA's decision was made in this case.

F L. WHETHER THE APPLICANT COULD RELY ON THE DEFENCE OF CONDONATION

[67] According to the applicant's learned counsel, the delay of almost six years and ten months in taking disciplinary action against the applicant, G amounted to a condonation of the applicant's misconduct.

[68] Firstly, we express our reservations on whether a public officer can rely on a defence of condonation in disciplinary proceedings. It was decided in the H High Court in *Ezaky Mulya bin Sapawi v Dato' Sri Nadzri Siron (Pengerusi Lembaga Tatatertib, Kumpulan Sokongan (No 1)) & Ors* [2020] MLJU 1920; [2021] 2 AMR 173, at [60] and [61], as follows:

[60] *I am of the view that [PO(DC)RJ do not provide for a defence of condonation of any disciplinary offence which has been prescribed by [PO(DC)R], As explained in the* I *above para 58, if YDPA had intended to provide for a defence of condonation (passive or otherwise) in [PO(DC)R], YDPA would have expressly prescribed as such in [PO(DC)R].*

[61] *I have not overlooked the judgment of Abdul Malek Ahmad JCA (as he then was) in the Court of Appeal in Azman bin Abdullah v Ketua Polis Negara* [1997] 1 MLJ

263 at pp 271–273 and 286; [1997] 1 CLJ 257, as follows:

> *The second concerns the doctrine of condonation. This stems from the fact that the appellant had on 1 December 1990 applied to retire optionally on 1 December 1991 and the police department had written to the Public Services Department on the matter on 26 March 1991 furnishing all the documents and stating in no uncertain terms that it is confirmed that the appellant is free from any disciplinary action.*
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> *On 4 October 1991, the Public Services Department had replied saying that they had already approved the appellant's application on 29 August 1991. ...*
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> ...
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> *As for the facts in this case, the relevant officer in the police department had explained that he had made a mistake when he told the Public Services Department that there was no disciplinary action against the appellant when he actually knew there was.* When a particular disciplinary action commences is a separate issue altogether but in this case it is our view that it must begin when investigations are initiated and this must well be before the police disciplinary authority informs the person concerned the charges he has to face which in this particular instance was only by the letter dated 10 October 1991. The statement that the appellant was free of any disciplinary action was written on 26 March 1991 and from the admission of the mistake, investigations had in fact commenced by then. Although at that point of time there were no disciplinary proceedings taken against the appellant as yet, the police department was already aware of the wrongdoings of the appellant which would necessitate disciplinary action being taken. *Why was nothing done since the latest date of the offences was just over a year before they made that so called erroneous statement to the Public Services Department while supporting the appellant's request for optional retirement? The delay in taking action must surely, in these circumstances and based on the authorities, be an act of condonation. As for the punishment, however, nowhere can we find that the police disciplinary authority had acted beyond its powers but if the issue of condonation had been taken into consideration, the trial judge's decision would surely have been the other way.*
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> ...
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> *However, in view of the doctrine of condonation, we are of the considered opinion that the charges against the appellant cannot stand and accordingly, we allow this appeal with costs here and below, set aside the order of the court below, order that the appellant be reinstated to the rank of Sub-inspector from the date of the reduction of his rank to Sergeant Major by the police disciplinary authority up to the date of his previously approved optional retirement on 1 December 1991, and order that the deposit be refunded to the appellant.* (Emphasis added.)

With respect, I am of the view that Azman Abdullah was decided based on the general orders and not under [PO(DC)R]. More importantly, in Azman Abdullah, the Police Department had informed Public Services Department (PSD) that there was no disciplinary action against the appellant and consequently, PSD had approved the appellant's optional retirement application, in this case, there is no evidence that the respondents had condoned, even passively, the subject matter of the two charges, As such, the applicant cannot rely on Azman Abdullah to support [the JRA]. (Emphasis added.)

[69] In *Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased)* [2008] 6 MLJ 1, at [39], Zaki Azmi PCA (as he then was) delivered the following judgment of the Federal Court:

> [39] *On the question of condonation raised by the respondent and referring to the case of Azman bin Abdullah v Ketua Polis Negara* [1997] 1 MLJ 263*, I hold, in this present case, that there was no condonation. Condonation in the context of employment contract is an act by the employer to excuse or forgive him for the wrongful act committed by the employee. Condonation can be in the active form ie by the act of telling the person that he has been forgiven for the wrongful act done or by a passive act of not taking any action. Halsbury's Laws of England (4th Ed) Vol 16 at p 439 para 648 describe condonation as follows: An employer who with full knowledge of his employee's misconduct elects to continue him in service cannot subsequently dismiss him for the offence which he has condoned. In our case, the second appellant cannot be said to have condoned the acts of the deceased because the deceased, as admitted by him in his letter, was interdicted* ('ditahan kerja'). (Emphasis added.)

It is to be noted *Vickneswary* concerned disciplinary proceedings conducted under the then general orders and not under PO(DC)R.

[70] The High Court's decision in *Ezaky Mulya* had been affirmed on appeal to the Court of Appeal please refer to the judgment of See Mee Chun JCA in [2022] 5 MLJ 173. However the Court of Appeal in *Ezaky Mulya*, at [88] and [89], considered the defence of condonation but had rejected its application in that case:

> [88] *We agree that the Federal Court in Vickneswary at p 16 (MLJ); p 594 (CLJ) has recognised condonation*:
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> ...
>
> [89] *The acts of condonation, if any, would amount to passive condonation, of not taking any action. Here, without any disciplinary action having been taken at that point of time, there was nothing to prevent the appellant from being called to attend the interviews and even succeeding. Hence, we find these acts did not amount to passive condonation.* (Emphasis added.)

[71] Even if it is assumed that the applicant could rely on the defence of condonation in disciplinary proceedings under PO(CD)R, we have no hesitation to reject the invocation of such a defence in this case due to the following reasons:

(1) the respondents did not condone, either positively or passively, the applicant's misconduct regarding the IPs (which formed the subject matter of the three charges) because Langkawi's OCPD show cause letter (26 March 2017) was sent to the applicant 25 days after the applicant's transfer from IPD Langkawi to IPK Kelang Utara on 1 March 2017;

(2) the applicant did not respond to Langkawi's OCPD show cause letter (26 March 2017). Hence, Langkawi's OCPD show cause letter (14 May 2017) was then sent to the applicant. Once again, the applicant did not reply to Langkawi's OCPD show cause letter (14 May 2017);

(3) a complaint was made against the applicant which caused the commencement of the investigation (JIPS) against the applicant. If the respondents had condoned the applicant's misconduct in this case, the investigation (JIPS) would not have been instituted against the applicant;

(4) the applicant's two statements (JIPS) were made and did not allege any condonation of the applicant's misconduct by the respondents; and

(5) the lengthy and detailed applicant's representation did not allude to any condonation of the applicant's misconduct by the respondents. Hence, such a reliance on this defence by the applicant, is clearly an afterthought to bolster unlawfully the JRA and this appeal.

M. IS THERE ANY GROUND FOR JUDICIAL REVIEW OF THE SECOND RESPONDENT'S DECISION?

[72] As explained in the above paras 53 and 54, the three charges were not defective and illegal. We cannot also accept the submission of the applicant's learned counsel regarding the unlawful constitution of the DA and the fact that the first respondent did not chair the DA wherein the DA's decision was made please refer to the above paras 63 to 66. As such, there is no ground for this court to quash DA's decision on the ground of illegality.

[73] We have no hesitation to decide that before the making of the second respondent's decision, the applicant had been 'afforded a reasonable opportunity of being heard' with regard to the three charges as provided in art 135(2) of the FC, regs 34(1) and 37(2)(b) of the PO(CD)R. This decision is premised on the following evidence and reasons:

(1) Langkawi's OCPD show cause letter (26 March 2017) and Langkawi's OCPD show cause letter (14 May 2017) had been sent to the applicant;

(2) the applicant had received the first respondent's letter (4 February 2020) which stated the three charges;

(3) by way of the applicant's letter (28 February 2020) and the applicant's letter (10 June 2020), the applicant had applied for and obtained two extensions of time from the first respondent to answer the three charges. In other words, the applicant had been given adequate time to prepare the applicant's representation; and

(4) a lengthy and detailed applicant's representation was furnished to the second respondent.

[74] With regard to the contention by the applicant's counsel that the second respondent failed to supply the alleged documents (not provided to applicant) to the applicant, we have already given reasons in the above paras 60 and 61 regarding why such a contention is untenable.

[75] We do not find the second respondent's decision to be 'irrational' so as to justify an exercise of the court's discretion to issue an order of certiorari to quash the second respondent's decision. Our reasons are as follows:

(1) any reasonably competent IO in the position of the applicant should have:

(a) ensured that the IPs under the applicant's care and custody (the subject matter of the first charge) were sent to the applicant's supervising officer (*pegawai penyelia*) as the 'first circulation' (*edaran pertama*);

(b) conducted investigation with regard to the IPs stated in the second charge; and

(c) handed over the IPs which constituted the subject matter of the third charge to the applicant's supervising officer before the applicant's transfer from IPD Langkawi to IPD Kelang Utara.

(2) the applicant alleged that the IPs were handed by him to Corporal Syamsuri. Such an averment beggars belief because:

(a) there was no hand-over list of IPs from the applicant to Corporal Syamsuri;

(b) Corporal Syamsuri gave two statements in the course of the investigation (JIPS) where he had denied receipt of IPs from the applicant ('Corporal Syamsuri's denial');

(c) the first respondent had given copies of Corporal Syamsuri's statements to the applicant. It was clear that the applicant knew of Corporal Syamsuri's denial. If Corporal Syamsuri's denial was false, the applicant, as a police Inspector, could have easily lodged:

(i) a police report against Corporal Syamsul; or

(ii) a complaint to JIPS against Corporal Syamsul.
However, none of the above action was taken by the applicant against Corporal Syamsul.

(d) the applicant had the audacity to allege that he recorded the hand-over of the IPs under his care and custody to Corporal Syamsuri in his own

despatch book. Incredulously, the applicant did not adduce his despatch book as evidence in this case. Nor could the applicant give a credible explanation regarding why his despatch book could not be produced as evidence.

(3) the three charges were very serious. The IPs were important because:

(a) without the IPs, the public prosecutor ('PP') could not decide to:

(i) direct further investigation;

(ii) charge; or

(iii) direct 'No Further Action'; or

(iv) discontinue any prosecution which had been commenced before the applicant's misconduct with regard to the IPs.

(b) if the PP had directed the institution of prosecution and the court case was still pending, the prosecution would be adversely affected by the 'missing' IP; and

(c) certain criminal cases had civil consequences, eg, road accidents. Without IPs, all parties in related civil cases would be deprived of evidence obtained by the applicant in the course of his investigation into those cases; and

(4) in view of the severe repercussions due to the applicant's misconduct with regard to the three charges (please refer to the above sub-para (3)), the dismissal of the applicant as a police Inspector by the second respondent was fully justified. Furthermore, such a punishment meted out to the applicant, would deter all other IOs from committing the same or similar disciplinary offence in the future.

[76] Even if it is assumed that 'disproportionality' is a separate ground for judicial review of the seconf respondent's decision, in view of the serious consequences of the applicant's misconduct (please refer to the above sub-para 75(3)), we do not find that the second respondent's decision to be 'disproportionate' in its effect on the applicant (resulting in the applicant's dismissal).

N. CONCLUSION

[77] Premised on the above evidence and reasons:

(1) this appeal is dismissed;

(2) the High Court's decision is affirmed; and

A (3) costs of this appeal in a sum of RM10,000 shall be paid by the applicant to the respondents.

[78] This judgment sends a clear message for all IOs to fulfil their duties under ss 3(3), 20(3) of the PA, IGSO and circulars/guidelines regarding IPs under their care and custody.

Appeal dismissed and High Court's decision affirmed.

Reported by Ashok Kumar